No. 105 Original

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1985

STATE OF KANSAS
Plaintiff,

v.

STATE OF COLORADO
Defendant.

MOTION TO REFER MOTION FOR LEAVE TO AMEND COMPLAINT

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January 27, 1989

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

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STATE OF KANSAS
Plaintiff,

v.

STATE OF COLORADO
Defendant.

MOTION TO REFER MOTION FOR LEAVE TO AMEND COMPLAINT

The State of Kansas hereby moves the Court to refer the attached Motion for Leave to Amend Complaint to the Special Master, the Honorable Arthur L. Littleworth, for his findings, conclusions, and recommendations.

In support hereof, Kansas states:

1. Kansas filed its motion for leave to file complaint on December 16, 1985.

2. On February 14, 1986, Colorado filed its brief in opposition for leave to file, based solely on the alleged failure to have exhausted administrative remedies.

3. On March 4, 1986, Kansas replied by filing an alternative motion to compel Colorado's compliance with an administrative investigation by the Arkansas River Compact Administration pursuant to Article VIII-H of the Compact. Act of May 31, 1949, 63 Stat. 145.

4. Following further argument over the issue of exhaustion, the Court granted leave to file the complaint on March 24, 1986.

5. In its answer, Colorado raised the alleged failure to exhaust administrative remedies as an affirmative defense.

6. Since leave to file was granted, the parties have been preparing for trial. The case is set for trial commencing on January 15, 1990.

7. Following a status conference on February 26, 1988, by order of March 14, 1988, the Special Master set May 13, 1988, as the deadline within which Colorado could move for partial summary adjudication on the basis of the alleged failure to exhaust administrative remedies.

8. Colorado again raised the alleged failure to exhaust administrative remedies in its motion to stay proceedings on May 12, 1988.

9. By his Decision of Special Master on Colorado Motion to Stay, the Special Master denied the motion on October 21, 1988.

10. On November 26, 1988, by direction of the Special Master, Colorado filed a second motion to stay, alleging failure to exhaust administrative remedies with respect to one allegation of compact violation not embraced by the first motion to stay. Simultaneously, Colorado filed a motion for partial summary judgment on an alleged factually undisputed legal question.

11. Kansas has responded to the motion to stay and the motion for partial summary judgment before the Special Master simultaneously with this filing with the Court. Kansas' Response to Colorado's Second Motion to Stay is attached hereto and incorporated herein as Appendix A.

12. While wholly lacking on its merits, Colorado's second motion to stay raised past and continuing violations by Colorado of Article V-E-3, V-E-4, and V-H-2 of the Arkansas River Compact.

13. The factual allegations of material depletion of stateline flows which underlie the violations of Article V-E-3, V-E-4, and V-H-2, were alleged in the original complaint.

14. The violations of Article V-E-3, V-E-4, and V-H-2 raise no new issues of fact, but present questions of law and equity.

15. The grant of Kansas' motion to amend would not raise additional questions of alleged failure to exhaust administrative remedies.

16. The grant of Kansas' motion to amend complaint to express an allegation of violation of Article V-E-3, V-E-4, and V-H-2 would not increase trial preparation time or delay the trial setting.

17. The State of Colorado would not be prejudiced by the granting of Kansas' motion to amend complaint.

18. An understanding of Kansas' motion to amend complaint rests on Kansas' Response to Colorado's Second Motion to Stay, attached hereto as Appendix A, which is presently pending before the Special Master.

WHEREFORE, the State of Kansas moves that the Court refer the attached Motion for Leave to Amend Complaint to the Special Master for his findings, conclusions, and recommendations.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W. CAMPBELL
Deputy Attorney General

LELAND E. ROLFS
Assistant Attorney General

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STATE OF COLORADO
Defendant.

MOTION FOR LEAVE TO AMEND COMPLAINT

The State of Kansas hereby moves to amend its complaint by adding thereto the following allegation:

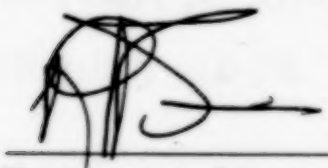
> The State of Colorado has failed and continues to fail to make deliveries of releases to which Kansas is entitled from John Martin Reservoir by an equivalent in stateline flow, as required by Article V-E-3 of the Compact, and in violation of Articles V-E-4 and V-H-2.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W. CAMPBELL
Deputy Attorney General

LELAND E. ROLFS
Assistant Attorney General



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Defendant.

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that I caused to be mailed three copies of Kansas' Motion to Refer Motion to Amend Complaint and Motion to Amend Complaint to be served by first-class mail on the following this 27th day of January, 1989:

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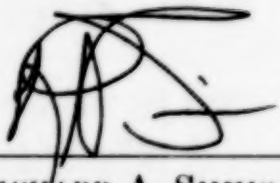

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

APPENDIX A
No. 105 Original

IN THE
Supreme Court of the United States
October Term, 1985

BEFORE THE HONORABLE ARTHUR L. LITTLEWORTH,
SPECIAL MASTER

STATE OF KANSAS
Plaintiff,

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KANSAS' RESPONSE TO COLORADO'S SECOND MOTION TO STAY

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
AFFIDAVIT OF DAVID L. POPE	1
INTRODUCTION	4
STATEMENT OF FACTS	5
The Article VIII-H Administrative Investigation of the Winter Storage Program	5
Presentation of the Spronk Report to the Compact Administration	9
The Submission of the Spronk Report	14
The Alleged Benefits of the 1980 Resolution Transit Loss Account	16
Review of the Winter Water Storage Decree	21
ARGUMENT	22
POINT I: A STATE IS REQUIRED TO EXHAUST ITS ADMINISTRATIVE REMEDIES ONLY ONCE	22
POINT II: IT WOULD BE ANALYTICALLY IMPRACTICAL TO SEPARATE DEPLETIONS OF ARKANSAS RIVER FLOWS CAUSED BY THE WINTER WATER STORAGE PROGRAM FROM THE ISSUES SET FOR TRIAL	25
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

American Federation of Government Employees v. Acree, 475 F.2d 1289 (D.C. Cir. 1973) 23

Bethlehem Steel Corp. v. E.P.A., 669 F.2d 903 (3rd Cir. 1982) 24

Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir. 1967, *cert.* denied 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed. 2d 1350 (1967) 22

Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980) 22

Conley v. Gibson, 355 U.S. 41 (1957) 6

Lodge 1858, American Federation of Government Employees v. Paine, 141 U.S.App.D.C. 152, 436 F.2d 882 (1970) 23

McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969) 23

Montana National Bank of Billings v. Yellowstone County, 276 U.S. 499, 48 S.Ct 331, 72 L.Ed. 673 (1928) 23

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Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Com'n., 838 F.2d 536 (D.C. Cir. 1988) 24

Seafarers Intern. v. United States Coast Guard, 736 F.2d 19 (2nd Cir. 1984) 23

Texas v. New Mexico, 462 U.S. 554 (1983) 24

Washington Ass'n. for Television & Children v. FCC, 712 F.2d 677 (D.C. Cir. 1983) 24

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Act of August 16, 1962, P.L. 87-590, 76 Stat. 389, 43 U.S.C. § 616 7

OTHER AUTHORITIES

Bernard Schwartz, *Administrative Law* (2nd ed., 1984) ... 22

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BEFORE THE HONORABLE ARTHUR L. LITTLEWORTH,
SPECIAL MASTER

STATE OF KANSAS
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STATE OF COLORADO
Defendant.

AFFIDAVIT OF DAVID L. POPE

STATE OF KANSAS
COUNTY OF SHAWNEE } ss:

I, DAVID L. POPE, being first duly sworn, upon oath state:

1. That I am presently employed by the Division of Water Resources, Kansas State Board of Agriculture as the Chief Engineer-Director and have been so employed since March 1, 1983. I am the chief state official charged with the administration of water rights in the State of Kansas.

2. That since March 1983 I have been, and am, one of the three Kansas representatives on the Arkansas River Compact.

3. That on March 28, 1985, the Arkansas River Compact Administration adopted a Resolution in Garden City, Kansas, initiat-

ing an investigation under Article VIII-H of the Arkansas River Compact.

4. That Resolution designated me, by virtue of my position as Chief Engineer of the State of Kansas, to be the Kansas representative on the committee to conduct the investigation.

5. That Mr. J. William McDonald, Director, Colorado Water Conservation Board, Department of Natural Resources, was designated by the Resolution as the Colorado representative on the investigation committee.

6. That by telephone conversation on April 10, 1985 and through an exchange of letters dated April 11, 1985 and May 2, 1985, I agreed with Mr. McDonald that each state would initially draft a scope of work concerning that state's allegations against the other state.

7. That these draft scopes of work were discussed at a meeting on May 7, 1985. For various reasons, Mr. McDonald disagreed with the scope of work which I had proposed as to how the committee should investigate Kansas' allegations.

8. That at the conclusion of the May 7, 1985 meeting, Mr. McDonald agreed to prepare and mail to me on May 21 or May 22 a proposed scope of work as to how Colorado would proceed to investigate the allegations made by the State of Kansas, including how to investigate the winter water storage program at Pueblo Reservoir.

9. By a letter which I received May 28, 1985, from Mr. McDonald, he proposed an entirely different plan of investigation for the Kansas allegations, including investigation of "Pueblo Dam and Reservoir, Winter Storage Program, and well development above John Martin Reservoir." The basic thrust of Mr. McDonald's proposed scope of investigation was to prepare a series of mass diagrams comparing flows at various gages for the periods 1949 to 1984. The purpose of this mass diagram analysis was merely to determine whether inflows to

John Martin Reservoir had declined and, if so, the extent of such declines. It was recognized by both of us that a mass diagram analysis could not determine the causes of such declines.

10. On June 3, 1985, the Committee met in Kansas City and agreed to temporarily defer consideration of a complete scope of work and to define a preliminary scope of work to include compilation of data and the construction of a series of mass diagrams which could be used to analyze changes in river flow at various points in the basin without committing either state to a final scope of work or to include any future analysis that might be needed.

11. That because the nature of the mass diagram investigation was to determine where reductions in flow had taken place, and the extent thereof, not to identify the causes of the reduction, the existence of items, such as the "Spronk Report," became irrelevant to the investigation until such time as a search for the causes of material depletion was resumed.

Further affiant says naught.

Dated this 24th day of January, 1989.

(Signed)
David L. Pope, P.E.
Chief Engineer-Director
Division of Water Resources
Kansas State Board of Agriculture

Subscribed and sworn to before me this 24th day of January, 1989.

/s/ DENISE J. ROLFS
Notary Public

My commission expires March 1, 1990.

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Defendant.

KANSAS' RESPONSE TO COLORADO'S SECOND MOTION TO STAY

Introduction

Colorado has moved to stay any claim by Kansas that the operation of the winter water storage program has materially depleted the Arkansas River in violation of Article IV-D of the Arkansas River Compact "based upon Kansas' failure to exhaust administrative remedies." Motion to Stay, November 28, 1988. While Colorado suggests that the Arkansas River Compact Administration did not investigate the winter water storage program in Pueblo Reservoir, its motion to stay is not based on an alleged failure to investigate. Rather, Colorado argues its motion on two discrete grounds: 1) Kansas' "failure to present the Spronk report to the Compact Administration during the 1985 investigation;" and 2) Kansas' refusal "to review the decree for the winter water storage program unless

Colorado agreed that it was being submitted to the Compact Administration for its approval . . .." Brief in Support of Motion to Stay at 2. Notwithstanding all of the rhetoric, the motion to stay has no other basis.

A review of the "material facts not in dispute" results in three unequivocal conclusions: 1) the Arkansas River Compact Administration did investigate depletions caused by the winter storage program until that investigation was terminated by Colorado; 2) the Spronk report was made unnecessary and irrelevant to the administrative investigation by actions of Colorado; and 3) Kansas' refusal to review the winter storage decree in 1987 had no bearing on the administrative investigation in 1985. Once properly explained, the facts show that Kansas has exhausted its administrative remedies with respect to the winter water storage program in Pueblo Reservoir to the same extent that it has exhausted its remedies with respect to all of its other allegations of compact violations.

Statement of Facts

The Article VIII-H Administrative Investigation of the Winter Storage Program

Colorado's position is conspicuous for its ambivalence. In its brief in support of its motion to stay, Colorado suggests that the administrative investigation under Article VIII-H "did not specifically include the winter storage program . . .." *Ibid.* at 20. Colorado further states that "[i]t was not until Kansas filed its March 18, 1986 brief that Colorado learned that Kansas intended to assert that the winter storage program had adversely affected the regimen of the Arkansas River . . .." *Id.* at 24.

Colorado's understanding of the matter was different when the administrative investigation was being conducted and when the suit was filed. In its brief in opposition to the motion for leave to file of February 14, 1986, Colorado argued rather strenuously that the Court should not exercise its jurisdiction because the "Administra-

tion [had] agreed to investigate the operation of Pueblo Reservoir . . .." *Id.* at 19-20. More specifically, Colorado explained its role this way: "Furthermore, the Colorado representatives agreed in the resolution of March 28, 1985, to investigate the operation of the winter storage program in Pueblo Reservoir . . .." *Id.* at 19.

It is clear that the Arkansas River Compact Administration conducted an investigation of the winter water storage program until Colorado terminated the investigation on October 4, 1985.[1] On March 28, 1985, at Kansas' behest, the Administration formally resolved to promptly investigate:

> 1. Whether the waters of the Arkansas River have been or are being materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under the Compact by:
>
> a. the operation of the Trinidad Dam and Reservoir Project, Colorado,
>
> b. *the operation of Pueblo Dam and Reservoir, Colorado, and the winter water storage program on the Arkansas River in Colorado,*
>
> c. well development of the waters of the Arkansas River in Colorado, and
>
> d. well development of the waters of the Arkansas River in Kansas . . ..

Ex. No. 28 (L) (Emphasis added).

[1]Colorado asserts that no claim of material depletion as a result of the operation of the winter storage program in Pueblo Reservoir "was expressly made in Kansas' complaint." Brief in Support of Motion to Stay at 1. If the claim is not within the complaint, of course, the motion to stay is obviously unnecessary.

The allegation falls within ¶¶ 7-9 of the complaint. Detailed factual averments are not necessary under Rule 8. *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

Pursuant to the Resolution, an Article VIII-H Investigation Committee was created. It subsequently met seven times. Before the first meeting in Denver on May 7, 1985, each state prepared a "scope of work" addressing its allegations. Colorado outlined the work necessary to investigate its allegations concerning the operation of Lake McKinney. Kansas outlined the investigation of the effects of post-compact wells and certain administrative practices and operations in Trinidad and Pueblo reservoirs, specifically including the operation of the winter water storage program in Pueblo Reservoir. *See* Ex. No. 29. The methodology adopted by the Investigation Committee and the exchanges that took place during its seven meetings in 1985 are detailed in Kansas' response to Colorado's original motion to stay. *Ibid.* at 11-15.

Colorado now argues that the Article VIII-H investigation did not purport to evaluate the effects of the winter storage program. Brief in Support of Motion to Stay at 20. As noted before, however, the Investigation Committee agreed to compile the requisite data and construct some fifty-four double and single mass diagrams to analyze changes in river flow. The Kansas and Colorado representatives failed to agree on the interpretation of the mass diagrams, including what the diagrams indicated regarding the flows at the gage labeled "Arkansas River at Las Animas," which measures flows in the reach where the winter water storage program takes place.[2] In this regard, the Kansas representative, David Pope, submitted a report entitled "Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact," which presented Kansas' interpretation of the relevant mass diagrams, Figures 13 and 14:

[2]The Fryingpan-Arkansas Project was designed to increase water supplies in the Arkansas River through transmountain importation, conservation of flood flows, and re-regulation of winter flows in Pueblo Reservoir. Act of August 16, 1962, P.L. 87-590, 76 Stat. 389, 43 U.S.C. § 616. It was contemplated that the ditches above John Martin Reservoir, *i.e.*, above the Las Animas gage, would forego winter diversions in exchange for the storage of the water in Pueblo Reservoir and certain other off-channel reservoirs. The object was to release the water during the irrigation season, thus optimizing its beneficial use.

> 4. The winter flows (November-March) of the Arkansas River at Las Animas have declined starting in about 1974. This decline is on the order of 5,000 to 7,000 acre-feet per season.
>
> 5. The flow of the Arkansas River at Las Animas declined during the 1949-1973 period by 112,000 acre-feet per year to 48% of the pre-compact average.
>
> 6. The declines in flow referred to above have exceeded those which would have been caused solely by the hydrologic variations which occurred during the 1970s and in part have been caused by factors other than hydrology.[3]

Ex. No. 47 at 22.

In the countervailing report of September 6, 1985, by William McDonald, the Colorado representative, Figures 13 and 14 were characterized quite differently, *i.e.*, as showing "[no] increased depletions to the flow of the Arkansas River at Las Animas . . .." "Report to Investigation Committee of the Arkansas River Compact Administration" at 20. Apparently forgetting these engineering reports, Colorado asserts that "Kansas did not present any engineering studies to support further investigation of the winter storage program." Brief in Support of Motion to Stay at 22.

[3]Figure 13 was the double mass curve of the annual adjusted streamflow of the Arkansas River at Canon City plotted against the annual streamflow at Las Animas. Figure 14 was the double mass curve of the adjusted streamflow at Canon City for the winter storage season plotted against the streamflow at Las Animas for the winter storage season. Ex. No. 47 at 20.

The winter water storage program was also specifically treated in Mr. Pope's report on October 5, 1985, entitled "Supplemental Report to the Arkansas River Compact Administration Regarding the Article VIII (H) Investigation of Alleged Violations of the Arkansas River Compact," Ex. No. 35 at 33.

The Investigation Committee met on October 8, 1985, and each state presented its supplemental report and discussed its conclusions. *See* Transcript of Proceedings, October 8, 1985, Ex. No. 37; *see also* Ex. No. 35; Ex. No. 36. The Committee again recognized that each state had reached different conclusions about the meaning of the mass diagram analyses and the causes of the declines in stateline flows. Accordingly, they decided to submit the original and supplemental reports separately to the Administration.

As a result of the impasse, the Arkansas River Compact Administration adopted its Resolution of October 8, 1985, terminating the investigation except in the limited area of mutual agreement. *See* Ex. No. 37 at 35-38. The area of "mutual agreement" resulted from Kansas' willingness to investigate all of its allegations, as well as Colorado's, and Colorado's willingness to investigate only its own. The Resolution of October 8, 1985, recited that Kansas wished to continue the administrative investigation of, *inter alia*, the "post-compact development and use of upstream storage reservoirs . . .." Colorado refused to continue the investigation.

Presentation of the Spronk Report to the Compact Administration

Attempting to suggest that Kansas acted in bad faith, Colorado first asserts that Kansas' failure to provide the Spronk report vitiated the administrative investigation that was conducted pursuant to Article VIII-H. The facts, however, show that the existence of the Spronk report was known to the Compact Administration before the administrative investigation began. Because of Colorado's rejection of Kansas' proposed method of analyzing the winter storage program and the Investigation Committee's choice of a different method of analysis, the Spronk report was excluded from consideration by the Compact Administration.

Glossing over the history, Colorado states that "[i]t was not until Kansas filed its March 8, 1986 brief that Colorado learned that Kansas intended to assert that the winter storage program had

adversely affected the regimen of the Arkansas River based on the Spronk report." Brief in Support of Motion to Stay at 24. Feigning surprise, Colorado states that it "immediately requested a copy of the report." *Id.* A year earlier, however, when the administrative investigation was initiated by Kansas on March 28, 1985, Mr. Spronk gave a presentation of his report to the Administration. David Pope, the Chief Engineer-Director of the Water Resources Division, Kansas State Board of Agriculture, explained that Kansas had done some "preliminary engineering studies" of the depletions to the inflow to John Martin Reservoir from the operation of the winter water storage program in Pueblo Reservoir. Transcript of Meeting of March 28, 1985, Ex. No. 28 at 71. He then asked Mr. Spronk "to make some comments regarding the hydrology that they have done in this particular regard." *Id.*

With the draft report in his hands, Mr. Spronk proceeded to explain his analysis to the Compact Administration.[4] *Id.* at 71-77. He began by reviewing the nature of the program, explaining that the reregulation of native waters in Pueblo Reservoir was part of the Fryingpan-Arkansas Project. Mr. Spronk made it clear that the analysis that his firm had done for Kansas "centered on the program's effect on winter inflows," as opposed to annual inflows, and qualified his conclusions by stating:

> A concern that we have not yet investigated fully is that the true effects of the program may, indeed, be masked since 1975 as a result, primarily, of trans-mountain diversions into the Arkansas River Basin. These trans-mountain diversions have resulted in return flows which have accrued to the flows of the Arkansas River. These flows have potentially

---

[4] A comparison of pages 66-70, labeled "Conclusions and Recommendations" in the draft report (Ex. No. 96), with pages 71-77 of the transcript of the special meeting of March 28, 1985, shows that Mr. Spronk was reading from the draft report. It is essentially verbatim.

offset or masked the total depletive effect of the winter water storage program.[5]

Transcript of Meeting of March 28, 1985, Ex. No. 28 at 75.

Mr. Spronk stated that the inflows to John Martin Reservoir during the winter storage season averaged 17,400 acre feet per year prior to the initiation of the program in 1976 and averaged 10,900 acre feet between 1976 and 1983. *Id.* at 75. He also stated his conclusion that the winter inflows to the conservation pool of John Martin had declined on the order of 4,600 to 6,500 acre feet per year since the program had been in effect. The same figures appear in the draft report. *Id.* at 76.

At the meeting on March 28, 1985, Colorado agreed to the investigation of the winter water storage program in Pueblo Reservoir and appointed an investigation committee. The Compact Administration's Investigation Committee held its first meeting on May 7, 1985, to discuss the scope of work for the investigation. Prior to the Committee meeting, the Colorado representative, Mr. McDonald, requested "a number of items by way of general background information for the investigation." The Spronk report was not requested. Minutes of the Investigation Committee, May 7, 1985, Ex. No. 29 at 2.

In regard to the operation of Pueblo Reservoir and the winter water storage program, Kansas proposed that the Investigation Committee:

1. Obtain all records and data showing historic diversions of winter flows by the participating entities in the winter water storage program.

2. Obtain and review all previous studies of the winter water storage program.

[5]Colorado has also refused to investigate the extent to which transmountain returns have and are masking ongoing depletions of native Arkansas River waters.

3. Quantify storage occurring during 1976-1985 in the winter water storage program.

4. Determine how and when water stored in the winter water storage program was used.

5. Analyze water flows of the Arkansas River at the Las Animas gage, both before and after 1976, determining amounts apportioned between program water and the conservation pool of John Martin Reservoir.

6. Ascertain whether any changes in the flow of the Arkansas River at Las Animas are the result of variances in the hydrology of the Basin.

7. Quantify the impact of the program on inflow to conservation storage and determine whether Article IV (D) has been violated.

8. Prepare report.

Attachment B, Scope of Work — Kansas Allegations, Ex. No. 29 at 4.

After disagreeing with Kansas' proposed scope of work in regard to postcompact well development, the Colorado representative disagreed with Kansas' proposed investigation of the operation of the winter storage program, which would have involved the Spronk report.[6] Instead, Colorado proposed to rewrite the scope of work for consideration at the Investigation Committee's second meeting on June 3, 1985. *See* Ex. No. 108. *See also* Affidavit of David L. Pope at 2.

On June 3, 1985, the Investigation Committee adopted a procedure to compile streamflow data and to construct a series of single and double mass diagrams of the flows of the Arkansas River and the Purgatoire River. The purpose of the mass analyses was to determine whether there had been declines in stateline flows or inflows to John

[6]Compare the "Purpose and Scope" of the Spronk report (Ex. No. 96 at 1-2) with the scope of work proposed by Kansas at the Investigation Committee meeting on May 7, 1985.

Martin Reservoir. This methodology was considerably broader and more generalized than the investigation Kansas had proposed and did not involve analyses of discrete causes of depletion. At this point the Spronk Report became irrelevant because of the broadened procedures. *See* Affidavit of David L. Pope at 3. The Committee agreed that if the diagrams indicated that depletions had in fact occurred, further studies would be undertaken to ascertain the causes. Minutes of Meeting of Investigation Committee, June 3, 1985, Ex. No. 30.

As has been explained previously, the mass diagrams showed substantial declines in postcompact stateline flows. After the mass diagrams were presented, however, considerable discussion ensued as to the causes of the declines. Because the states disagreed over the substance of the diagrams, it was finally decided that each would prepare a report explaining its interpretation of the data and the diagrams. *See* Minutes of Meeting of Investigation Committee, July 12, 1985, Ex. No. 32.

The end result was Colorado's refusal to undertake any further study or investigation of the operation of Pueblo Reservoir and the winter water storage program. *See* Resolution of October 8, 1985, Ex. No. 37. Had Kansas' proposed method of investigation been followed, the Spronk Report would have been useful to the Compact Administration's Investigation Committee. As it turned out, Colorado terminated the investigation before the winter storage program would have been studied individually as a cause of depletions to John Martin inflows.

Failure to present a written draft to the Committee or the Compact Administration did not vitiate the investigation. Instead, Colorado arbitrarily terminated the investigation without studying the winter storage program as a cause of depletions to John Martin inflows because it refused to recognize that man-made depletions had occurred. *See* Kansas' Response to Colorado's Motion to Stay, June 14, 1988, at 5-19. It is clear that the attempts by Kansas to investigate depletions caused by the winter storage program were blocked by

Colorado's actions. Colorado can not have it both ways. It can not control the course of the investigation by adopting a mode of analysis that excluded the Spronk report and subsequently complain that the investigation was ineffective because the Spronk report was not utilized.

The Submission of the Spronk Report

Continuing to make a cat's paw of the Spronk report, Colorado explains one side of the history to the Special Master. The chronology shows that the actions complained of by Colorado occurred one year after the termination of the investigation.

In September, 1985, counsel for Colorado agreed in a telephone conversation to provide counsel for Kansas with a copy of a groundwater study or "well inventory" by Mr. Ron Thaemert. Ex. No. 93. On March 23, 1986, a year after the Spronk report had been introduced to the Compact Administration, Colorado requested copies of two studies cited by Kansas in its reply brief of March 4, 1986, one of which was the Spronk report. Ex. No. 90. Though the Spronk report had been reviewed at the Compact Administration meeting on March 28, 1985, it was withheld at the time because it had not been completed.

At the status conference held by Judge McCree on August 20, 1986, Kansas submitted a proposed pretrial order that included a specific description of each of the studies that Kansas intended to undertake in preparation for the litigation. Ex. No. 101 at 4-5. Kansas also requested a similar description of the engineering studies that Colorado intended to undertake. Transcript of Status Conference, August 20, 1986, Ex. No. 102 at 33. Colorado refused, explaining that it was a defendant and did not know the nature of its studies at the time. *Id.* at 34-37, 44.

While Kansas also stated its desire to be informed of studies already undertaken, specifically the Thaemert "well inventory," the Special Master relied on a "gentlemen's agreement" to describe the

studies as soon as possible. *Id.* at 45. The Master specifically directed counsel for Colorado to write a letter regarding the groundwater study. Colorado agreed to this request. *Id.* at 47.

Shortly after the conference, Kansas decided to release the Spronk report, notwithstanding that the report had not been completed. Inadvertently, counsel released a study with the same title, *i.e.*, "Evaluation of the Arkansas River Winter Water Storage Program in Colorado," prepared by Mr. Spronk when he was with the firm of Simons, Li & Associates. *See* Ex. No. 93 at 1.

Subsequently, having not been provided with the well inventory, counsel decided to withhold the Spronk report until the two reports could be exchanged:

> We cannot release the Spronk report because the report exists only in draft form. However, if you are willing to release your well study, which Hal Simpson last referred to as a "well inventory," we would consider the possibility of exchanging reports sometime within the next six to eight weeks.

Ex. No. 22 at 1. Counsel had hoped that the Spronk report could be completed within the time stated.

Budgetary constraints made it impossible to complete the report. In any event, on June 3, 1987, counsel for Kansas tired of the cat and mouse game and released the report even though it had not been completed. At the same time, Kansas again requested the Colorado ground water study. Ex. No. 93.

Since then, Kansas has repeatedly asked for the Thaemert study, relying on the fact that it was initially promised in September, 1985. Finally, on November 11, 1988, Kansas formally requested a copy of the Thaemert report in its First Request to Produce Documents to the State of Colorado. On January 12, 1989, counsel for Kansas inquired about the status of Colorado's response to the request for production, asking specifically if the Thaemert report would be produced. Counsel for Colorado stated that it would be produced. On

January 17, 1989, Colorado formally responded to the request, withholding the report on the theory that it was done in anticipation of litigation.[7]

The Alleged Benefits of the 1980 Resolution Transit Loss Account

Colorado has also risen above the facts by divining that the Spronk report was withheld because it "concluded that there may have been some decline in inflow to John Martin Reservoir, but advised that Kansas might not benefit from raising the issue ...." Brief in Support of Motion to Stay at 24. While this supposition is irrelevant to its motion to stay, it nonetheless requires a response. Colorado confuses the facts by supplanting the issue of the winter water storage program in Pueblo Reservoir with a lengthy and misleading apologue about the transit loss account in John Martin Reservoir. *See* Brief in Support of Motion to Stay at 5-11.

Specifically, Colorado asserts that "[u]nder the 1980 operating plan, a portion of the water stored in John Martin Reservoir under the winter storage program has been used for the Kansas transit loss account" and that Kansas "did not want to risk renegotiation of the operating plan by suggesting modifications to the winter storage program." *Id.* at 25 and 2. The fact of the matter is that the "benefits" from the 1980 operating plan for John Martin Reservoir are part of Kansas' entitlement under the Compact. *Cf.*, Motion to Refer Motion for Leave to Amend Complaint, January 27, 1989. Kansas has also been advised that the 1980 Resolution is quite possibly *ultra vires*, *i.e.*, it is a legally ineffective amendment of Article V of the Arkansas River Compact. Its "renegotiation" has never been a concern of Kansas.

A brief explanation of Article V-E-3 is necessary to an understanding of the 1980 Resolution. Article V-E-3 provides that "[r]eleases of

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[7]Kansas will file a motion to compel production in due course.

river flow and of stored water to Colorado shall be measured by gaging stations at or near John Martin Dam *and the releases to which Kansas is entitled shall be satisfied by an equivalent in state-line flow."* (Emphasis added). The provision benefited Kansas in that it mandates that transit losses will be borne by Colorado, and it benefits Colorado in that Colorado can make the delivery with "equivalent . . . state-line flow." The effect is that Colorado can charge Kansas for its full demand without having to release the entire amount.

The provision as it relates to the 1980 Resolution has to be understood in the context of changing hydrologic conditions. When Article V was written, the reach of the Arkansas River between John Martin Reservoir and the stateline was a gaining stream, largely from surface water return flows and from ground water inflow or accretions. Because the river was a gaining river, Colorado was given the alternative of providing releases to Kansas in part from the accretions and returns. Thus, Colorado didn't have to release all of the molecules of water to which Kansas was entitled, plus a cushion for transit losses, but could deliver "equivalent" water.

By 1974, the flows of the Arkansas River had dropped off by approximately 70%. Due primarily to the proliferation of postcompact wells below John Martin Reservoir, the river was no longer a gaining river, but was often dry in different parts of the reach. Colorado's failure to regulate the river by the internal administration of Colorado law made it physically impossible for requested releases to reach the stateline. For example, between April 5-10, 1976, a release was made of 10,800 acre feet from John Martin at a rate of 1,000 cfs. The total loss down to the stateline was 2,373 acre feet. Colorado's 60% share was 6,480 acre feet. Colorado ditches diverted 6,505 acre feet. The flow at the stateline was 1,970 acre feet, resulting in a loss to Kansas of 54% of its entitlement. Although Colorado acknowledged its duty, it failed in its responsibility for delivery.

After numerous complaints and discussion of the matter by the Arkansas River Compact Administration, Colorado sought to solve the problem in part by issuing an administrative order pursuant to

Colorado law and Article V of the Arkansas River Compact requiring Colorado ditches to bypass releases of water for Kansas. When the ditches deliberately violated the order by diverting water during the initial release, Colorado filed a complaint and application for injunction. The complaint alleged that the actions of the defendants, the Amity Mutual Irrigation Company and the Buffalo Mutual Irrigation Company, had made it impossible for Colorado to abide by Article V-E-3 of the Compact. The complaint was authored by David Robbins, when he was an assistant attorney general in Colorado in the Natural Resources Section. *See* Ex. No. 103, Complaint, ***Colorado v. Amity Mutual Irrigation Company and Buffalo Mutual Irrigation Company***, Civil No. W-4764, Water Division No. 2, August 16, 1978. At trial, it was argued:

> In this matter, your Honor, the State is seeking an Order from the Court upholding its authority to issue orders to allow the State to meet its obligations under the Arkansas River Compact. We believe that reading of the Compact which is codified at 37-69-101 of the Colorado Revised Statutes shows that if Kansas makes a call for the water it is entitled to 400 cubic feet per second measured at the State line. The provisions which provide for that are, I believe, found in Article V, Sub E, Sub (3) of the Compact. That provision specifies that measurements for the flow for Kansas is to be measured at the State line, whereas Colorado's flow is measured just below John Martin Dam. It is also our opinion that the State water officials, that is to say, the State Engineer and Division Engineer and appropriate Water Commissioners, are the proper officials to enforce the obligations of the State of Colorado under the Compact . . .."

Transcript of Proceedings, Case No. W-4764, Ex. No. 104 at 120-21.

Because the case focused solely on two ditches in District 67, the water court ruled that the state engineer had acted discriminatorily.[8] Ex. No. 105, Findings of Fact at 8. The court found that there were approximately 5,000 surface decrees, nearly 5,000 well diverters, and almost 5,000 stock ponds in District 67 alone. Colorado did not seek to enjoin these uses. The court dismissed the complaint on equal protection grounds, further observing that "[i]t is clear that junior underground water decrees developed after the ratification of the Compact have materially depleted in usable quantity and availability the waters of the Arkansas River for use to water users in Colorado and Kansas." Ex. No. 105 at Section V.

The State of Colorado appealed. Because of concern over the implications of the district court's decision and the imminent possibility of interstate litigation, however, Colorado decided to abandon the appeal as it related to administration under the Compact. Colorado stated: "In the course of preparing [the] appeal, new evidence was discovered which established that the water commissioner's order to the ditches of water district 67 was based on an erroneous interpretation of the Arkansas River Compact." Ex. No. 106, Opening Brief, Colorado Supreme Court No. 81 SA 467 at 2. The brief was authored by Dennis Montgomery, who had become an assistant attorney general for Colorado in the Natural Resources Section. Sensitive to the political problem, the Colorado Supreme Court agreed that the water judge "improperly took judicial notice that

[8]Amity raised twelve affirmative defenses, three of which were critical to the district court's ultimate ruling: 1) that the duty to deliver water to Kansas should be imposed equally on all diverters in the Arkansas River Basin; 2) that Colorado itself had caused the problem by: a) not enforcing water rights decrees, particularly ground water rights, under the prior appropriation doctrine; b) adopting inaccurate and artificial transit and evaporation losses; c) allowing out-of-priority storage in Pueblo Reservoir; d) permitting the unregulated construction of stock ponds; e) failing to adopt rules and regulations respecting ground water uses; and f) failing to make regulations for the distribution of the releases under the Compact; and 3) that Colorado itself had destroyed the regimen of the river. The district court agreed with Amity.

stock ponds and wells developed after ratification of the Arkansas River Compact have materially depleted the waters of the Arkansas River." *Id.* at i; Ex. No. 107, Opinion at fn. 3. Nonetheless, the Supreme Court affirmed the district court's judgment.

With the transit loss problems in Colorado and the convergence of other factors, such as the desire to create a permanent pool in John Martin Reservoir for fish, wildlife, and recreational purposes, the Compact Administration recognized the possible benefits of changes in John Martin operations. The Administration's discussions culminated in the Resolution of April 24, 1980, which created storage accounts in John Martin for Kansas, for the ditches in Colorado Water District 67, and for other Colorado ditches. Paragraph III(D) created the "Kansas Transit Loss Account." The account was supplied by waters obtained from Amity Mutual Irrigation Company, by an agreement allowing Amity to transfer part of its storage water decree to John Martin Reservoir. Amity agreed to supply 35% of the transferred water that it otherwise could have stored in the Great Plains Reservoir system.[9]

The transit loss account created by the 1980 Resolution is a misnomer. Article V-E-3 requires that Kansas' entitlement be measured at the stateline. The responsibility for transit losses rests squarely on Colorado. The transit loss account simply helps Colorado make its required deliveries, which does not embarrass Kansas. The

[9]The Great Plains system was extremely inefficient, with most of the water stored being lost to evaporation. At the Compact Administration meeting on May 5, 1976, Bill Hund of the Amity Canal stated that they had done a thirty-six year study on the Great Plains reservoirs and concluded that they received fifty-one percent of the water out of the reservoirs that was diverted into them. *See* Transcript of Proceedings, Arkansas River Compact Administration, May 5, 1976 at 23. Amity actually received a significant net gain by its agreement to contribute 35% of its water to the Kansas transit loss account.

alleged "benefit" to Kansas is something Kansas is entitled to under the Compact.[10] Colorado is simply wrong in deciphering that Kansas wilfully withheld the Spronk report because it jeopardized Kansas' "benefits" under the 1980 operating plan. The theory is cute, but it is nonsense.

Review of the Winter Water Storage Decree

Colorado argues that Kansas' refusal in November, 1987, to review the Colorado Water Court's winter storage decree "created an impasse which has prevented the Compact Administration from carrying out a review of the winter storage program." The administrative investigation of the winter storage program under Article VIII-H, however, was terminated by Colorado on October 8, 1985.[11]

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[10]There are only two references in the 1980 Resolution which refer to the winter storage program in Pueblo Reservoir. Paragraphs III(B) and III(C) establish storage accounts in John Martin Reservoir for the Fort Lyon Canal Company and Las Animas Consolidated Canal Company. The water to be stored in these accounts is delivered to John Martin "under an approved Pueblo winter storage plan . . . the delivery cannot include water that otherwise would have accumulated in conservation storage." In its brief, Colorado suggests that all "other water" stored in John Martin Reservoir in accordance with Paragraph III of the 1980 Resolution is somehow tied to or associated with the winter storage program. However, the account established for the Amity Canal Company makes no reference to "an approved Pueblo winter storage plan" as do the accounts for Fort Lyon and Las Animas.

[11]Colorado predicates its argument on Kansas' "legal position on the 1951 Resolution," *i.e.*, that it requires that the Compact Administration approve any plan of reregulation of native waters. The legal position, however, has nothing to do with whether Kansas sought an administrative investigation of whether the storage program has depleted inflows into John Martin. That position is treated in Kansas' Response to Colorado's Motion for Partial Summary Judgment.

ARGUMENT

POINT I

A STATE IS REQUIRED TO EXHAUST ITS ADMINISTRATIVE REMEDIES ONLY ONCE.

The record shows that Kansas has made a reasonable, good faith effort to exhaust administrative remedies before the Arkansas River Compact Administration with respect to depletions caused by the winter water storage program. *See* pp. 5-9, above; Kansas' Response to Motion to Stay, June 14, 1988, at 6-19. That effort was frustrated by the political structure of the Arkansas River Compact Administration, which allowed Colorado to exercise its veto power to prevent an investigation of the allegations in the March 28, 1985 Resolution. Accordingly, further efforts at exhaustion would be futile.

The futility of administrative proceedings is a recognized exception to the exhaustion requirement. As one commentator put it: "To insist, as a prerequisite to judicial relief, that those aggrieved first pass through the very procedures that are discriminatory would be to require an exercise in futility." Bernard Schwartz, *Administrative Law* § 8.31 at 505-506 (2nd ed. 1984). Kansas agrees that the policy considerations for exhaustion which have been articulated by Colorado are correct. But these policies can be realized only if the administrative forum is structured in a manner which allows their realization.

The cases are clear. In *Camenisch v. University of Texas*, 616 F.2d 127, 134 (5th Cir. 1980), the Court held that "[i]t is well-settled that where there is no adequate administrative procedure available, the exhaustion doctrine does not apply. *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967), *cert. denied* 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed. 2d 1350 (1967)." Because the inadequacy of the Arkansas River Compact Administration's procedures are the problem, further invocation of those procedures is both pointless and

injurious to Kansas. As the court held in *American Federation of Government Employees v. Acree*, 475 F.2d 1289 (D.C. Cir. 1973):

> But there are cases where the customary rationales for the exhaustion of administrative remedies doctrine — avoidance of unnecessary judicial intervention and the need for full, unhampered exercise of agency expertise on a well developed factual record of its own making, *see, e. g.*, McKart v. United States, 395 U.S. 185, 193-195, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969) — do not apply and the doctrine's application thus become pointless. In some cases the doctrine is no more than "an exercise in futility," *see* Lodge 1858, American Federation of Government Employees v. Paine, 141 U.S.App.D.C. 152, 166, 436 F.2d 882, 896 (1970), particularly where it is clear beyond doubt that the relevant administrative agency will not grant the relief in question. *See* Montana National Bank of Billings v. Yellowstone County, 276 U.S. 499, 48 S.Ct 331, 72 L.Ed. 673 (1928).

475 F.2d at 1292. Kansas' experience before the Compact Administration has resulted only in Colorado's refusal to participate.

Colorado's citation of legal authority is based on the erroneous premise that Kansas provoked an impasse in the Article VIII-H investigation by failing to "reasonably" pursue the 1985 investigation. Accordingly, the cases are inapposite. The facts show that Kansas' efforts to obtain an Administration investigation of the five issues in the March 28, 1985 Resolution were repeatedly frustrated. *See* pp. 5-9, above; Kansas' Response to Motion to Stay, June 14, 1988, at 6-19 Brief. For example, Colorado cites *National Conservative Political Action Comm. v. Federal Election Comm'n.*, 626 F.2d 953, 957 n.8 (D.C. Cir. 1980). In that case, however, the court was addressing a circumstance in which the claimant had refused to appear before the administrative agency. As the court noted "... the first time the Commission was confronted with appellants' objections to the Commission's regulation was in the district court." 626 F.2d at 957. Similarly, in *Seafarers Intern. v. United States Coast Guard*, 736

F.2d 19, 26 n.11 (2nd Cir. 1984), the Court observed that "[e]xhaustion analysis is relevant to our holding on justiciability because Seafarers' failure to exhaust or even engage in administrative review has left the factual record so undeveloped that the case is not ripe for judicial review ...." Both cases address the situation in which administrative review was evaded. In this case, administrative review was not evaded by Kansas, but rather was frustrated by Colorado.

Colorado also cites two cases for the proposition that claims not presented to an administrative agency may not be made for the first time to a reviewing court. *Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Comm'n.*, 838 F.2d 536, 551 (D.C. Cir. 1988); *Washington Ass'n. for Television & Children v. FCC*, 712 F.2d 677, 680 (D.C. Cir. 1983). Neither is precedent for the circumstances presented here, where Kansas made a clear effort to obtain review of the winter storage program by the Compact Administration prior to filing suit. Ironically, Colorado has cited *Bethlehem Steel Corp. v. E.P.A.*, 669 F.2d 903 (3rd Cir. 1982). That case held that "the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue." 669 F.2d at 906. The administrative scheme at issue here has resulted in the necessity of an original action.

As in *Texas v. New Mexico*, 462 U.S. 554 (1983), the Court's original jurisdiction in this case was invoked by Kansas only when administrative procedures provided by Compact proved unworkable. As the Special Master concluded in his opinion of October 21, 1988, the Court has "intimated that 'fundamental structural considerations,' such as an interstate compact that accords each signatory state the power to veto authoritative commission action, may abbreviate inquiry into the question of whether an available remedy exists at the administrative level." It is clear that further analysis of the winter storage program in Pueblo Reservoir by the Compact Administration is futile.

POINT II

IT WOULD BE ANALYTICALLY IMPRACTICAL TO SEPARATE DEPLETIONS OF ARKANSAS RIVER FLOWS CAUSED BY THE WINTER WATER STORAGE PROGRAM FROM THE ISSUES SET FOR TRIAL.

Quite aside from the law and the fact that Kansas has exhausted its administrative remedies with respect to the winter water storage program, the impact of the program on streamflow at the stateline cannot be evaluated accurately in isolation from the consideration of other effects on stateline flows. Hydrologically, individual factors contributing to decreased stateline flows cannot be analyzed separately. Instead, the analysis of one cause requires the simultaneous consideration of the interactions among other causes.

Institutional arrangements and the stream system hydrology must be evaluated together to be conclusive about causes of depletion. Institutional arrangements, such as the winter water storage program, combine hydrodynamically with other institutional actions, such as pumping from alluvial wells along the Arkansas River, to produce a net hydrologic result. In this case the result is reduced stateline flows. Accordingly, the impact of the winter water storage program can be identified only by considering that program within the context of all causes of depletion in the overall hydrologic system, both natural and man-made.

The institutional system in the Arkansas River Basin is comprised of arrangements that govern the operation of surface water reservoirs, the direct diversion of surface water, and the pumping of groundwater. The hydrologic system consists of the surface water and groundwater subsystems. Relationships exist within and between the institutional and hydrologic systems. Examples of the relationships within the hydrologic system include groundwater returns to the Arkansas River which contribute to streamflow and streamflow which provides groundwater recharge. Interaction between the institutional and hydrologic systems include groundwater pumping which

affects streamflow, which affects surface diversions. In turn, surface diversions affect groundwater pumping.

The winter water storage program produces effects that are the result of such relationships. The program is designed to reduce winter diversions for irrigation and to increase storage in the program reservoirs. It leads to five results: The decrease of storage in non-program accounts in John Martin Reservoir; the increase of the summer supply for Colorado from the program reservoirs; the decrease of the summer supply for Kansas and Colorado from non-program accounts in John Martin Reservoir; the increase of summer pumping in Colorado, owing to reduced winter storage in John Martin Reservoir; and decreases of summer pumping, owing to the increased winter storage in the program reservoirs. These institutional and hydrologic actions and reactions combine to produce a particular effect on streamflow at the stateline. The effect can be identified only by considering all of the relationships within and among the systems.

The State of Kansas is pursuing investigations that address these relationships. The issues are being addressed through the development and use of two types of models. The first is a descriptive model for the analysis of hydrologic data. This model is based on water budgets for various components of the hydrologic system. The second is a prescriptive model to simulate the relationships within and between the hydrologic and institutional systems. This model is based on both the hydrodynamic relations that describe the hydrologic system and on the administrative rules that comprise the institutional system. These models are being used conjunctively to identify and quantify the causes and affects of the depletion of streamflow at the stateline. Both models require that all of the institutional actions that potentially effect state-line flow be considered simultaneously. Accordingly, the winter water storage program must be included in the analysis that will be presented to the Master. For the Special Master to receive this factual evidence, of necessity,

yet preclude it from the legal dimension of his opinion, as Colorado proposes, would not be feasible.

CONCLUSION

In deciding this motion we ask the Special Master to consider the Greek saying that those whom the Gods wish to destroy they first make mad. In our circumstance, those whom the Gods wish to destroy they first require to perpetually exhaust administrative remedies before the Arkansas River Compact Administration.

Respectfully submitted,

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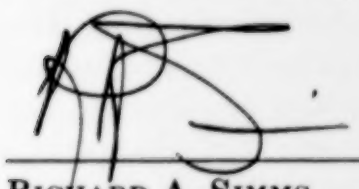

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No. 105 Original

In The Supreme Court

Of The United States

STATE OF KANSAS
Plaintiff,

v.

STATE OF COLORADO
Defendant.

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that I caused to be mailed three copies of the foregoing Kansas' Response to Colorado's Second Motion to Stay to be served by first-class mail on the following this 27th day of January, 1989:

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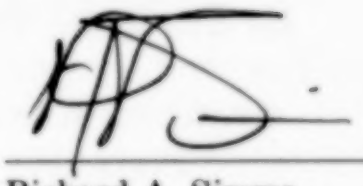

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